

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK**

CROWN CASTLE FIBER LLC,

Plaintiff,

v.

CITY OF ROCHESTER, NEW YORK; MALIK D. EVANS, as the MAYOR of the CITY OF ROCHESTER (in his official capacity); RICHARD PERRIN, as the COMMISSIONER, CITY OF ROCHESTER DEPARTMENT OF ENVIRONMENTAL SERVICES (in his official capacity); and the ROCHESTER CITY COUNCIL,

Defendants.

Civil Action No. 6:20-cv-06866-EAW-MWP

**NOTICE OF PLAINTIFF’S MOTION *IN LIMINE* TO EXCLUDE
DEFENDANTS’ COST SPREADSHEET AND TO PRECLUDE LOUIE TOBIAS
FROM OFFERING EXPERT OPINION TESTIMONY**

PLEASE TAKE NOTICE that Plaintiff Crown Castle Fiber LLC (“Crown Castle”), pursuant to the Court’s Dec. 22, 2022 Pre-Trial Order (Dkt No. 40), moves this Court *in limine* to exclude Defendant City of Rochester’s (“City”) “Cost Spreadsheet” from being introduced or relied upon by Defendant at trial and to preclude City witness Louis Tobias from offering opinion testimony.

The Cost Spreadsheet is an Excel document produced by the City to Crown Castle with Bates No. COR 000011. The City produced the same document, with the same Bates Number, to plaintiffs Cellco d/b/a Verizon Wireless (“Verizon”) and ExteNet Systems Inc. (“ExteNet”) in their separate lawsuits challenging the City’s telecommunications fees on similar grounds as those raised by Crown Castle in its suit. *See Cellco Partnership D/B/A Verizon Wireless v. City of Rochester*, No. 6:19-cv-06583 (W.D.N.Y); *ExteNet Systems, Inc. v. City of Rochester, New*

York, No. 6:20-cv-07129 (W.D.N.Y). The Cost Spreadsheet was created by the City's Telecommunications Director, Louie Tobias, who the City intends to call as a witness in its direct case.

Per the Court's Minute Entry dated December 20, 2022 (Dkt No. 39), all three cases will be tried together beginning on June 1, 2023. The Court has determined that the City bears the burden of proof on the question of whether its fees are cost-based, because the "Small Cell Order unequivocally places the burden of demonstrating that the fees at issue are a reasonable approximation of costs on the municipality." *See* Decision and Order, *Cellco Partnership v. City of Rochester*, No. 6:19-cv-06583, at 21-22 (W.D.N.Y. Aug. 22, 2022) (Dkt No. 65). As a result, the parties have agreed that the City will put on its direct case first at the consolidated trial.

ExteNet has filed a motion *in limine* seeking a ruling from the Court that Mr. Tobias is precluded from offering expert opinion testimony regarding the reasonableness of the City's costs, cost allocations, or fees, or regarding the appropriate allocation of costs pursuant to Federal Rules of Evidence 701 and 702. *ExteNet Systems v. City of Rochester*, No. 6:20-cv-07129 (motion filed Feb. 24, 2023) (Dkt No. 51). Verizon is filing a motion *in limine* seeking exclusion of the Cost Spreadsheet on the grounds that it is inadmissible hearsay, was prepared in anticipation of litigation, and is inherently unreliable and untrustworthy. *Cellco Partnership v. City of Rochester*, No. 6:19-cv-06583 (motion to be filed Feb. 24, 2023).

Because all three cases challenging the City's fees will be heard in a single trial with one direct case by the City, a decision to limit Mr. Tobias' testimony or to exclude the Cost Spreadsheet on the grounds offered by ExteNet or Verizon, respectively, should apply to the trial as a whole. However, to avoid any confusion as to the plaintiffs' positions on evidentiary matters and to preserve Crown Castle's objections to the City's evidence as related to Crown

Castle's suit, Crown Castle files this separate motion *in limine* to limit Mr. Tobias' testimony and to exclude the Cost Spreadsheet.

Crown Castle agrees with ExteNet and Verizon as to the inadmissibility of the evidence covered by their respective motions. To avoid duplicative legal filings and reduce the burden on the Court, Crown Castle's Memorandum of Law directs the Court to the memoranda of law accompanying the respective motions *in limine* filed by ExteNet and Verizon, the reasoning of which Crown Castle adopts in support of this Motion.

Respectfully submitted,

/s/ Joshua S. Turner

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February 24, 2023

Counsel for Plaintiff

CERTIFICATE OF SERVICE

I, Joshua S. Turner, hereby certify that on February 24, 2023, I electronically filed the foregoing Notice of Motion with the clerk of court for the U.S. District Court for the Western District of New York using the Court's CM/ECF system, which will serve the filing on all participants who are registered CM/ECF users.

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